Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

BARBARA TOTH, *PETITIONER*
V.
FRANK TOTH, WANDA TAYLOR TOTH, DAVID TOTH, SR., BRANDI SANSON, AND JOANNE VALLARELLI, GUARDIAN AD LITEM,
RESPONDENTS

On Petition for Writ of Certiorari to the Michigan Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a grandparent has a constitutionally protected interest in her relationship with her grandson where she has enjoyed court-ordered visitation with him for most of his life?

II. Whether a grandparent's right to due process is violated where she is denied standing in the adoption of her grandson by two other grandparents, where another court has granted her visitation with her grandson pursuant to court order?

LIST OF ALL PARTIES BELOW

Barbara Toth, Appellant in the Michigan Court of Appeals and Michigan Supreme Court.

Frank Toth, Appellee in the Michigan Court of Appeals and Supreme Court.

Wanda Taylor Toth, Appellee in the Michigan Court of Appeals and Supreme Court.

Joanne Vallarelli, Appellee in the Michigan Court of Appeals and Supreme Court.

David Toth Sr., biological father, Appellee, did not participate in the Michigan Court of Appeals or Supreme Court.

Brandi Sanson, biological mother, Appellee, did not participate in the Michigan Court of Appeals or Supreme Court.

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PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

Barbara Toth respectfully petitions for a writ of certiorari to review the opinion and judgment of the Michigan Court of Appeals which affirmed the orders of the Mecosta County Probate Court confirming the adoption of her grandson and denying her petition to intervene.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals (App. A, *infra.*, 1A-9A) is reported at 227 Mich. App. 548, 577 N.W.2d 111 (1998). The order of the Michigan Supreme Court denying leave to appeal (App. D, *infra.*, 11A) is reported at 457 Mich. 863, 578 N.W.2d 690 (1998). The order of the Michigan Supreme Court denying reconsideration (App. E, *infra.*, 13A) is reported at — Mich. —, — N.W.2d — (1998). The orders of the Mecosta County Probate Court confirming the adoption of Petitioner's grandson (App. B, *infra.*, 9A) and denying Petitioner's Petition for Rehearing (App C., *infra.*, 10A) are unreported.

JURISDICTION

The Michigan Court of Appeals filed its decision and opinion on January 27, 1998. (App. A, *infra.*, 1A-9A). The Michigan Supreme Court denied leave to appeal in its order entered April 27, 1998, (App. D, *infra.*, 11A) and denied reconsideration in its order entered June 29, 1998. (App., *infra.*, 13A).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be

had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mich. Comp. Laws Ann. § 710.24a(1), (6) (West Supp. 1995)

(1) Interested parties in a petition for adoption are all of the following:

(a) The petitioner.

(b) The adoptee, if over 14 years of age.

(c) A minor parent, adult parent, or surviving parent of an adoptee, unless 1 or more of the following apply:

(i) The rights of the parent have been terminated by a

court of competent jurisdiction.

(ii) A guardian of the adoptee, with specific authority to consent to adoption, has been appointed.

(iii) A guardian of the parent, with specific authority to consent to adoption, has been appointed.

(iv) The rights of the parent have been released.

(v) The parent has consented to the granting of the petition.

(d) The department or a child placing agency to which the adoptee has been, or for purposes of subsection (3) is proposed to be, released or committed by an order of the juvenile division of the probate court.

(e) A parent, guardian, or guardian ad litem of an unemancipated minor parent of the adoptee.

(f) The juvenile division of the probate court with permanent custody of the adoptee.

(g) A court with continuing jurisdiction over the adoptee.

(h) A child placing agency of another state or country that has authority to consent to adoption.

(i) The guardian or guardian ad litem of an interested party.

* * *

Additional parties

(6) In the interest of justice, the court may require additional parties to be served.

Mich. Comp. Laws Ann. 722.27b (West 1998)

Sec. 7b. (1) Except as provided in this subsection, a grandparent of the child may seek an order for grandparenting time in the manner set forth in this section

only if a child custody dispute with respect to that child is pending before the court. If a natural parent of an unmarried child is deceased, a parent of the deceased person may commence an action for grandparenting time. Adoption of the child by a stepparent under chapter X of Act No. 288 of the Public Acts of 1939, being sections 710.21 to 710.70 of the Michigan Compiled Laws, does not terminate the right of a parent of the deceased person to commence an action for grandparenting time.

(2) As used in this section, "child custody dispute" includes a proceeding in which any of the following occurs:

(a) The marriage of the child's parents is declared invalid or is dissolved by the court, or a court enters a decree of legal separation with regard to the marriage.

(b) Legal custody of the child is given to a party other than the child's parent, or the child is placed outside of and does not reside in the home of a parent, excluding any child who has been placed for adoption with other than a stepparent, or whose adoption by other than a stepparent has been legally finalized.

(3) A grandparent seeking a grandparenting time order may commence an action for grandparenting time, by complaint or complaint and motion for an order to show cause, in the circuit court in the county in which the grandchild resides. If a child custody dispute is pending, the order shall be sought by motion for an order to show cause. The complaint or motion shall be accompanied by an affidavit setting forth facts supporting the requested order. The grandparent shall give notice of the filing to each party who has legal custody of the grandchild. A party having legal custody may file an opposing affidavit. A hearing shall be held by the court on its own motion or if a party so requests. At the hearing, parties submitting affidavits shall be allowed an opportunity to be heard. At the conclusion of the hearing, if the court finds that it is in the best interests of the child to

enter a grandparenting time order, the court shall enter an order providing for reasonable grandparenting time of the child by the grandparent by general or specific terms and conditions. If a hearing is not held, the court shall enter a grandparenting time order only upon a finding that grandparenting time is in the best interests of the child. A grandparenting time order shall not be entered for the parents of a putative father unless the father has acknowledged paternity in writing, has been adjudicated to be the father by a court of competent jurisdiction, or has contributed regularly to the support of the child or children. The court shall make a record of the reasons for a denial of a requested grandparenting time order.

(4) A grandparent may not file more than once every 2 years, absent a showing of good cause, a complaint or motion seeking a grandparenting time order. If the court finds there is good cause to allow a grandparent to file more than 1 complaint or motion under this section in a 2-year period, the court shall allow the filing and shall consider the complaint or motion. The court may order reasonable attorney fees to the prevailing party.

(5) The court shall not enter an order restricting the movement of the grandchild if the restriction is solely for the purpose of allowing the grandparent to exercise the rights conferred in a grandparenting time order.

(6) A grandparenting time order entered in accordance with this section shall not be considered to have created parental rights in the person or persons to whom grandparenting time rights are granted. The entry of a grandparenting time order shall not prevent a court of competent jurisdiction from acting upon the custody of the child, the parental rights of the child, or the adoption of the child.

(7) The court may enter an order modifying or terminating a grandparenting time order whenever such a

modification or termination is in the best interests of the child.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

As the Michigan Court of Appeals recognized in its opinion, the facts of this case are unusual. (App. A, *infra*, p. 1A). Petitioner Barbara Toth is the paternal grandmother of the young child whose adoption is the focus of this dispute. Until their divorce in 1988, Petitioner was married to Respondent Frank Toth; their son, David Toth Sr., is the father of the child. After the divorce, Frank Toth moved in with, and eventually married, Wanda Toth. Wanda Toth's daughter, Brandi Sanson, is the mother of the child. Thus, the child's parents, who never married, are stepbrother and stepsister. Respondent Frank Toth is the child's paternal grandfather, Respondent Wanda Toth is the child's maternal grandmother, and both are now the child's adoptive parents. (App. A, *infra*, p. 2A).

In October 1990, shortly after the child's birth, the child's father sought custody in the Montcalm County Circuit Court. Petitioner Barbara Toth and Respondents Frank and Wanda Toth intervened in that action. Following a trial, custody of the child was awarded to Respondents Frank and Wanda Toth; Petitioner Barbara Toth was awarded visitation with the child. (*See* App. A, *infra*, p. 2A). Petitioner appealed this decision to the Michigan Court of Appeals, which affirmed in an unpublished per curiam decision, *Toth v. Toth*, No. 158467 (Mich. App. December 15, 1993)(App. F, *infra*, pp. 15A-17A), finding that Petitioner Barbara Toth lacked standing to challenge the custody decision. (App. A, *infra*, p. 2A; App. F, *infra*, p. 17A).

For several years Petitioner enjoyed visitation with her grandson pursuant to various orders of the Montcalm County Circuit Court. (*See,* App. A, *infra*, pp. 2A-3A). On March

1, 1993, while Petitioner's appeal of the custody decision was still before the Court of Appeals and had not yet been decided, Respondents Frank and Wanda Toth filed a petition to adopt the child in the Mecosta County Probate Court. (Petition to Adopt, Mecosta County Probate Court, 3/1/93). They did not notify or serve a copy of the petition on the Montcalm County Circuit Court, although required to do so by Michigan statute[1] and court rule,[2] nor on the Michigan Court of Appeals, the appellate court in which the custody case was then pending. Nor did they notify Petitioner Barbara Toth, who at that time enjoyed regular visitation with her grandson. (See App. G, *infra*, ¶ 2; App. H, *infra*, ¶ 2).

Almost two months after the petition was filed, the child's parents consented to the adoption in a hearing in the Mecosta County Probate Court. (Mecosta County Probate Court, transcript April 29, 1993).[3]

Petitioner Barbara Toth did not learn of the Mecosta

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[1] Under Michigan law, "interested parties in a petition for adoption" include "[a] court with continuing jurisdiction over the adoptee." Mich. Comp. Laws § 710.24a(1)(g); Mich. Stat. Ann. § 27.3178(555.24a)(1)(g).

[2] Mich. Ct. R. 3.205 (2) provides:

> If a minor is known to be subject to the prior continuing jurisdiction of a Michigan court, the plaintiff or other initiating party must mail written notice of proceedings in the subsequent court to the attention of
>
> (a) the clerk or register of the prior court, and
>
> (b) the appropriate official of the prior court.

[3] The Michigan Court of Appeals stated that the petition to adopt was filed <u>after</u> the April 1993 consent to adopt. (App. A, *infra.*, p. 2A). However, this conclusion is not supported by the record.

County adoption petition until nearly ten months later, after the Michigan Court of Appeals had affirmed the Montcalm County custody decision. Responding to this discovery, Petitioner retained counsel and, on February 17, 1994, filed a motion to intervene (App. G, *infra*, p. 18A), an emergency motion to stay the adoption (App. H, *infra*, p. 19A), and her own petition to adopt her grandson.

Petitioner did not explicitly raise a due process claim in the probate court; however, she did raise the elements of due process in her motions. In the motion to intervene, Petitioner argued that her "interest in these matters has been established by specific authority granting visitation over parental interests as set forth by Circuit Court decree and its subsequent modifications." (App. H, *infra*, p. 20A). In a subsequent paragraph, she argued that "[w]here the Circuit Court for Montcalm County has granted certain rights and not relinquished its jurisdiction, Petitioner's right to be heard in this matter is established." (*Id.*). She further argued that "she failed to receive notice nor was she permitted to be heard at any hearing with regard to Petitioners by failure of notice." (*Id.*)

In her Emergency Motion to Stay Adoption for Lack of Jurisdiction, Petitioner argued that she was granted visitation by order of the Montcalm County Circuit Court (App. G, *infra*; p. 18A), that these rights have established her as an interested party as a matter of law, *(id.*, p. 19A); and that she would have received notice had such notice been properly served. (*Id.*).

On that same day, Mecosta County Probate Court Judge Lavail Hull entered an order staying the adoption "pending arguments by the Petitioner, Barbara Toth, on issues set forth in her Petition and Motion." (App. I, *infra*, p. 22A). However, no further hearings were scheduled on Petitioner's motion to intervene at that time. Proceedings continued in the Montcalm County custody case over the next year, however, as the custodial grandparents disputed Petitioner's

visitation with her grandson.

On June 1, 1995, the Mecosta County Probate Court entered an order terminating the stay of adoption, "having determined that no action has been taken by intervening petitioner, Barbara Toth, since February of 1994." (Appendix J, *infra*, p. 23A). However, it was not until a Montcalm County visitation hearing on June 6, 1995, that Petitioner Barbara Toth learned that there had been some activity in the Mecosta County adoption case. (*See* Mecosta County Probate transcript 7/6/95, pp. 12-13).

Following this discovery, both Petitioner Barbara Toth and Joanne Vallarelli, an attorney appointed as guardian ad litem for the child in the Montcalm County proceedings, moved to contest the adoption. Counsel for Petitioner Barbara Toth argued that Petitioner had received no notice of the original petition for adoption, no notice of any investigation conducted by the probate court, and no notice that the probate court had set aside the February 1995 order staying proceedings. (Mecosta County Probate Transcript 7/6/95, pp. 8, 12-15, 19-20). The court dismissed these arguments, stating that the stay had been lifted because "no action has been taken by the intervening petitioner, Barbara Toth" and that its file indicated that notice had been sent to Petitioner's counsel. (*Id.* at 14). Moreover, the court stated that it had not ordered an investigation on Barbara Toth's petition, and had no duty to do so. (*Id.* at 18-19). The Court did, however, postpone the adoption for two weeks to allow an opportunity for the Montcalm County Circuit Court to grant a stay, although stating "You, counsel, don't get it. You don't have standing." (*Id.* at 24).

Following this hearing, Petitioner's trial counsel filed a motion in the Montcalm Circuit Court seeking a stay of the adoption, arguing that the only purpose of the adoption was to terminate her visitation with the child, that continuing visitation is in the best interest of the child, and that the adoption was not in the best interest of the child. This

petition was accompanied by affidavits of Appellant, her counsel, and several witnesses. (Ex Parte Petition to Stay Adoption and to Assume Full Jurisdiction, Montcalm Circuit Court, 7/13/95). The guardian ad litem filed a similar petition in the Montcalm Circuit Court, arguing that the best interests of the child were not fully addressed in the probate court recommendation, that her investigation was incomplete, and that further investigation was necessary. (*See* Mecosta Probate Court transcript 7/20/95, p 5).

The Mecosta Probate Court hearing to confirm the adoption was held on July 20, 1995. Petitioner Barbara Toth, with substitute counsel, appeared at the hearing and filed objections to the confirmation of adoption. She argued that the adoption was not in the best interests of the child, that the probate court erred in denying her standing to contest the adoption, that the probate court lacked jurisdiction over this matter due to the notice problems, and that the circuit court had insufficient notice to assume jurisdiction of this matter. (Objection to Confirmation of Adoption, Mecosta County Probate Court, 7/20/95).

The Guardian Ad Litem also filed objections to the confirmation of adoption and a motion to adjourn the adoption. She argued that confirmation of the adoption would violate the constitutional guarantees of equal protection, that the attached affidavits stated many allegations against Frank and Wanda Toth which required further investigation, that previous psychological reports indicated that the child was at risk in the custody of Frank and Wanda Toth that updated reports are required, that the probate court erred in denying the Guardian Ad Litem full access to the adoption files, and that the child should continue visitation with Petitioner Barbara Toth. She requested a stay of six months to allow an updated investigation. (2nd Objections to Adoption Confirmation and Motion to Adjourn Adoption Confirmation and to Stay Adoption, Mecosta Probate Court, 7/19/95).

The confirmation hearing in the Mecosta Probate Court

went forward on July 20, 1995. At that hearing the court stated that it would treat the objections as ex parte motions to stay the adoption. (Mecosta Probate Court, transcript 7/20/95, pp. 4, 13). In response to the objections of the guardian ad litem, the court stated that he had spoken to the Montcalm Circuit judge, and that he had not been stayed. (*Id.* at 6). next heard argument from Appellant Barbara Toth, represented by substitute counsel. After noting that the objections were on the record, Judge Hull stated: "This I view as an ex-parte request for stay, which is denied." Following the denial of these objections, Petitioner Barbara Toth stated, for the record: "I wanted my grandparent rights, and all rights that I do have, preserved for appeal." (*Id.* at 15). The probate court then proceeded to confirm the adoption of Petitioner's grandson. (*Id.*, pp. 16-19; App. B, *infra,* p. 9A). An order denying Petitioner's own Petition for Adoption was entered on August 17, 1995. (App. M, p. 26A).

On August 9, 1995, Petitioner filed a Petition for Rehearing of the order confirming the adoption in the Mecosta Probate Court. The hearing on the Petition for Rehearing was held in the Mecosta Probate Court on September 12, 1995. During argument, counsel for Petitioner argued that the Michigan adoption allowed the addition of parties "in the interest of justice, stating that "in the interest of justice, she is a party in this proceeding." (Mecosta Probate Court, transcript 9/12/95, p. 8). Following argument, the court held that Petitioner had no standing to intervene in the adoption of her grandson, denied the petition for rehearing, and denied the request for stay of the adoption. (Mecosta Probate transcript 9/12/95, p. 16). The order denying the Motion for Rehearing was entered on September 12, 1995. (App. C, *infra*, p. 10A).

The final Montcalm Circuit Court hearing in this case took place on September 29, 1995, when the court dismissed the guardian ad litem, closed the file on the custody dispute,

and terminated the prior visitation orders. (App. L, *infra*, p. 25A).

Petitioner filed a timely claim of appeal from the decisions of the Mecosta Probate Court. This appeal was consolidated with a subsequent appeal from the decision of Montcalm Circuit Court. On October 3, 1995, Petitioner filed a motion in the Court of Appeals seeking a stay of the adoption, an order continuing Appellant's visitation with her grandson, and access to the Mecosta County Probate Court adoption file. On October 30, 1995, the Court of Appeals entered its order denying the request for a stay but granting the request for access to the adoption file in order to facilitate this appeal. (App. N, *infra*, p. 27A).

Petitioner explicitly raised the issue of the violation of her constitutional right to due process on pages 21-22 and 25-26 of her brief on appeal to the Michigan Court of Appeals. (Appendix O, pp. 28A-29A). Relying on the decisions in *Quarles v French,* 611 S.W.2d 757 (Ark., 1981) and *Brown v Meekins*, 643 S.W.2d 553 (Ark., 1982), Petitioner argued (App. O, *infra*, 29A):

> In addition, the adoption of her grandson by the Appellees has the effect of terminating her relationship with the child, and ending her court-ordered right to visitation with him. As in *Quarles*, *supra*, due process requires that a court not deprive her of these rights without affording her, at a minimum, the right to be heard in a meaningful manner. *Cummings v Wayne County*, 210 Mich App 249; NW2d (1995); *Dobrzenski v Dobrzenski*, 208 Mich App 514; 528 NW2d 827 (1995).

The Court of Appeals did not decide this case until January 27, 1998, and only after Petitioner filed two motions to expedite this case. In a published opinion, the court affirmed the lower court decisions; on the issue of Petitioner's standing in the adoption, the court found (App.

A, *infra*, p. 6A):

> A grandmother, even one with visitation rights, is not enumerated as an interested party in the statute. Accordingly, the probate court correctly determined that Barbara Toth lacked standing to object to the adoption.

In reaching its decision, the Court of Appeals did not reach the due process issue raised by Petitioner. (App. A, *infra*).

Following this decision by the Court of Appeals, Petitioner filed an Application for Leave to Appeal in the Michigan Supreme Court. In her application, Petitioner again raised the due process issue, arguing that Petitioner should have been granted standing to intervene in the adoption of her grandson and to participate in a meaningful manner. (Appendix P, *infra*, p. 30A). Without explicitly addressing the constitutional issues raised in the application, the Michigan Supreme Court denied leave to appeal, stating that "the applications for leave to appeal are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court." (App. D, *infra*, p. 11A).

Following the denial of her Application for Leave to Appeal, Petitioner filed a Motion for Reconsideration in the Michigan Supreme Court. She once again argued that denial of standing in the adoption of her grandson violated her right to due process. (App. Q, *infra*, pp. 33A-38A). On June 29, 1998, the Michigan Supreme Court issued its order denying Petitioner's Motion for Reconsideration, stating that "the motions for reconsideration of this Court's order of April 27, 1998, are considered, and they are DENIED, because it does not appear that the order was entered erroneously." (App. E, *infra*, p. 14A).

REASONS FOR GRANTING THE PETITION

I. The Decisions of the Michigan Court of Appeals and the Mecosta County Probate Court Violate Petitioner's Right to Due Process Guaranteed By Both the Federal and State Constitutions.

The Due Process Clause of the Fourteenth Amendment provides that a state shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1. The Michigan Constitution provides an identical guarantee: "No person shall . . . be deprived of life, liberty or property, without due process of law." Mich. Const. art. I, § 17. However, by refusing to allow Petitioner to intervene in the adoption of her grandson, the Michigan Court of Appeals and the Mecosta County Probate Court have done just that: they have deprived Petitioner of her liberty interest in the society of her grandson, an interest protected by various orders of the Montcalm Circuit Court granting her visitation with her grandson, without affording her the procedural due process necessary to support such a decision.

The Fourteenth Amendment "imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair." *Lassiter v. Department of Social Services*, 452 U.S. 18, 33 (1981). In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court explained that the requirement of procedural due process "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." 424 U.S. at 332. Explaining further, the Court stated that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* at 333, quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

In *Eldridge*, *supra*, 424 U.S. at 335, the Court created a

three-step balancing test for the determination of the process due in any given circumstance:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of the additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

This test has also been adopted by the Michigan Supreme Court. *In re Brock*, 442 Mich. 101, 111, 499 N.W.2d 752 (1993).

In this case, the balance of the various private interests at stake against the risk of erroneous deprivation, the value of additional procedural safeguards, and the interests of the State of Michigan, compels the conclusion that Petitioner's right to due process was violated when she was denied standing to intervene in the adoption of her grandson. This is so because the effect of decisions of the Mecosta County Probate Court, the Michigan Court of Appeals, and the Michigan Supreme Court was to terminate Petitioner's court-ordered visitation with her grandson, indeed to completely sever her relationship with him, without affording her a meaningful opportunity to be heard in the matter.

A. Petitioner has a constitutionally protected interest in her relationship with her grandson.

Several courts that have considered the issue have determined that grandparents have some type of protected interest in the society of their grandchildren. In *Wilson v*

Family Services Division, Region Two, 554 P.2d 227 (Utah, 1976), after her daughter surrendered her parental rights, the plaintiff sought to restrain the state child welfare agency from placing her grandchild for adoption before determining her own fitness to adopt the child. At a hearing following the issuance of a temporary restraining order, the district court refused to grant plaintiff a hearing on her petition. 554 P.2d at 228. The Supreme Court of Utah reversed that decision, ordered that plaintiff be granted a hearing on her petition, and stated, *id.* at 230-231 (footnotes omitted):

> [I]t should be apparent that although the parents of a child are the only ones who have a direct and vested right to his custody, further recognition of family relationships and reciprocal interests and responsibilities is so interwoven in the fabric of the law that the logical consequence thereof is that next of kin, such as this grandmother, do have some dormant or inchoate right or interest in the custody and welfare of children who become parentless, so that they may come forward and assert their claim; and that even though this does not rise to the dignity of an absolute legal right, it is a legitimate interest of such a nature that it should strongly commend itself to serious consideration by the administrative agency; and that failing, by the court, at least to the extent of according her a hearing and determination on the merits of her petition.

Four years later, in a case in which a grandmother challenged the procedures by which her grandchildren were adopted, the same court identified this "inchoate right or interest" as a "liberty interest". *State in Interest of Summers v. Wulffenstein*, 616 P.2d 608, 610 (Utah, 1980). However, because the grandmother in *Wulffenstein* was given "serious consideration" as a potential adoptive parent herself, participated in several hearings, presented evidence and cross-exam-

ined witnesses, the court denied her due process challenge, finding that any deficiency in the administrative proceedings was cured by the probate court proceedings. *Id.* at 611.

In a case involving a grandmother's attempt to intervene in a proceeding to determine the temporary placement of her grandchildren, the Court of Appeals of Oklahoma relied on this Court's decision in *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977), to find that she had a "legitimate, 'limited' liberty interest in this matter . . . regardless of the size of that interest." *The Matter of P. C.; T. C.; M. C.; and A. C.*, 842 P. 2d 364 (Okla. Ct. App. 1992). The court remanded to allow her to intervene in the proceedings, although not on due process grounds, which the court found unnecessary to address. *Id.* at 367.[4]

The Court of Appeals for the Ninth Circuit touched on this issue in *Drollinger v. Milligan*, 555 F.2d 1220 (7th Cir. 1977), a case in which the intervening grandfather alleged that his freedom to care for his granddaughter was unconstitutionally limited by conditions of probation imposed upon the child's mother. The court agreed, stating in a footnote, 555 F.2d at 1227, n. 6:

> The nuclear family has traditionally constituted the unit afforded the protection of due process. We see no reason, however, not to extend this guaranty to the grandfather-grandchild relationship.

The court further explained (quoting *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950)(citation and footnotes omitted):

> This basic integrity of the family unit has been afforded the protection of due process of law. Circumscription of this right must therefore be

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[4]The court did note, however, that the constitutional issue was not raised in the trial court. 842 P. 2d at 368.

preceded by "notice and opportunity for hearing appropriate to the nature of the case".

The court reversed and remanded, instructing the district court to enjoin enforcement of the terms and conditions of probation "until such time that the state provides the necessary hearing." 555 F.2d at 1227.

To be sure, other courts have held that under the particular circumstances before them grandparents did not have constitutionally protected interests in their relationships with their grandchildren. The applicability of these decision to this case is weakened, however, because the grandparents either already had the benefit of a full adversarial hearing and the opportunity to present evidence, or the court premised its denial of the due process claim on the presumption that such a hearing would be available.

In *Graham v. Children's Services Division*, 39 Or. App. 27, 591 P.2d 375 (1979), the court found that the grandparents had no protected liberty interest, but it appears that in that case the grandparents had earlier had a full hearing when the trial court terminated their son's parental rights and took custody from the grandparents. 591 P.2d 377-378. In *Browder v. Harmeyer*, 453 N.E.2d 301 (Ind. App. 1983), the custodial grandmother claimed her due process rights were violated when her grandchild was taken from her custody and placed for adoption without any finding that she was unfit; the court denied her constitutional challenge, finding that the notice and evidentiary hearing provided sufficient due process, "even if Browder does have a fundamental right to family integrity." 453 N.E. at 308-309 (citation omitted).

In a case decided under Michigan law, the Court of Appeals for the Sixth Circuit denied the due process claims of a grandmother and uncle of four Vietnamese children brought to the United States during "Operation Babylift" and later placed for adoption in Michigan, finding that "there appears to be no question that the plaintiffs will have an opportunity to be heard before the state courts decide the

issue." *Huynh Thi Anh v. Levi*, 586 F.2d 625, 632 (6th Cir. 1978). More recently, in *Kennedy v. Kennedy*, 688 N.E.2d 1264 (Ind. App. 1997), the Court of Appeals of Indiana stated that despite the enactment of grandparent visitation statutes in all fifty states, "grandparents do not possess a cognizable liberty interest in visitation with their grandchildren." 688 N.E. 2d at 1268. However, as the court states, "[t]he trial court in this case conducted an adversarial hearing at which Grandmother was able to present and challenge evidence. That procedure was adequate." *Id.* at 1269.

In this case, unlike those cases cited above, Petitioner Barbara Toth was not allowed the opportunity for meaningful participation in the adoption of her grandson when the Mecosta County Probate Court refused to allow her to present evidence on the issue and denied her motion to intervene.

The Court of Appeals for the Ninth Circuit has held that a mere biological relationship between grandparents and their grandchildren will not give rise to a constitutionally protected right to adopt their grandchildren: "[T]he relevant authorities are uniform in their refusal to recognize any right whatever to the adoption of one's grandchildren, at least where the only ties that bind are biological." *Mullins v. Oregon*, 57 F.3d 789, 796 (9th Cir. 1995).

However, neither *Mullins* nor the precedents on which it is premised, *see id.* at 796-797, offer persuasive reasons for denying Petitioner standing in this case. Moreover, the more recent trend may be to find that grandparents do have "associational rights" in their relationships with their grandchildren, as the Court of Appeals of Minnesota recently held in *In re Santoro*, 578 N.W.2d 369 (Minn. Ct. App. 1998) *review granted* — N.W.2d — (Minn. 1998). In *Santoro* the maternal grandparents sought visitation with their grandchildren, who had been adopted by the paternal grandparents. The paternal grandparents challenged the constitutionality of Minnesota's grandparent visitation statute, arguing that it

unconstitutionally infringed upon their parental rights guaranteed by the Fourteenth Amendment. The court disagreed, noting that "other states have upheld their statutes based on the notion that grandparents and children share interests that give rise to a state interest sufficient to justify the imposition on the rights of parents." 578 N.W.2d at 375 (citations omitted). Explaining further, the court was "satisfied that a state law restricting the right of grandparents to associate with their grandchildren . . . would violate 'intrinsic human rights, as they have been understood in this Nation's history and tradition.'" *Id.* at 376, quoting *Smith v. Organization of Foster Families*, *supra*, 431 U.S. 816, 845 (1977).

Even if this Court is reluctant to find a liberty interest inherent within the relationship between grandparents and their grandchildren, in this case Petitioner's liberty interest in her relationship with her grandson rests upon more than mere biological affinity: the child lived with Petitioner for a time during his infancy and for a number of years Petitioner enjoyed visitation with him pursuant to various orders of the Montcalm County Circuit Court. (*See*, App. A, *infra.*, p. 3A). Although Michigan's Supreme Court has held, in the context of an equal protection challenge that "[g]randparent visitation is not encompassed within the definition of a 'fundamental right' explicated by the United States Supreme Court," *Frame v. Nehls*, 452 Mich 171, 550 N.W.2d 739, 744 (1996), the court in the same breath recognized that "[t]he right of visitation is one created by statute." *Id.* Moreover, the court noted that the grandparent visitation rights constitute the "single exception" to the rule that Michigan's Child Custody Act "does not create substantive rights of entitlement." *Id.*, *quoting Ruppel v. Lesner*, 421 Mich. 559; 364 N.W.2d 665 (1984).

Thus, although the Michigan Supreme Court has refused to characterize a grandparent's statutorily created right to visitation as "fundamental", it has at least recognized a "substantive right of entitlement" created by statute. In *Wolff*

v. McDonnell, 418 U. S. 539, 558 (1974), this Court explained that a liberty interest may arise from a state statute and that a statutorily-created liberty interest deserves the same constitutional protection as a statutorily-created property interest: "We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State." Such an interest "has a real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." *Id.* at 557.

Michigan's grandparent visitation statute, Mich. Comp. Laws Ann. § 722.27b (West, 1998), provides that, where a grandparent requests visitation with a grandchild, that grandparent must provide an affidavit showing the facts in support of the request; at that point, "[a] hearing shall be held by the court on its own motion or if a party so requests. At the hearing, parties submitting affidavits shall be allowed an opportunity to be heard." § 722.27b(3). [5] In *Olepa v. Olepa*, 151 Mich. App. 690, 391 N.W.2d 446 (1986), the Court of Appeals explained under this statute, where a grandparent sought visitation, the circuit court "was required to hold a hearing during which [the grandparent] was allowed to be heard." 151 Mich. App. at 702, 391 N.W.2d at 452; moreover, "[i]n this context, the 'opportunity to be heard' includes at least the right of parties to testify, to present relevant and material affidavits, and to argue in support of their position."

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[5] The statute provides for modification or termination of grandparent visitation "whenever such modification or termination is in the best interests of the child," Mich. Comp. Laws Ann. § 722.27b(7), but it is silent as to the procedure for such modification or termination. Certainly, if a hearing is required for granting grandparent visitation, such hearing is also required for termination or modification.

151 Mich. App. at 702, 391 N.W.2d 452-453. In addition, as the court stated, a grandparent is "also allowed to oppose modifications or terminations of visitation orders." 151 Mich. App. at 704, 391 N.W.2d at 453. In this case, however, Petitioner Barbara Toth was not allowed to oppose the adoption of her grandson, which had the ultimate effect of terminating her visitation with her grandson without any opportunity for a meaningful hearing.

In some cases, such as *Reed v. Glover*, 319 Ark. 316, 889 S.W.2d 729 (1994), there may be no violation of a statutorily-created liberty interest because the grandparent did not fit within the statutory criteria for visitation. 889 S.W.2d at 730-731. In denying the grandmother's claim, the court explained that her "argument necessarily assumes she has a legal right to visit her grandson that has been taken away without an opportunity to be heard. The argument . . . has no merit." *Id.* at 732. However, in this case Petitioner not only was eligible for visitation with her grandchild and had the statutory right to a hearing before termination of such visitation, she had actually been granted visitation by the Montcalm Circuit Court. (See App. A, *infra*, p. 2A).

Thus, whether the Court decides that a constitutionally protected liberty interest is inherent in her status as grandparent or was created by statute, it is clear that in this case Petitioner has an interest worthy of due process protection.

B. Courts in other states have found that a denial of standing in similar cases violated the requirements of due process.

Courts of other states have held, in cases similar to the instant case, that a denial of standing to a grandparent with visitation rights is a violation of due process guaranteed by the federal and state constitutions.

Interpreting a state statute that allows post-adoption visitation by grandparents to continue the grandchild's natural

parent has died, the Supreme Court of Wisconsin reversed an intermediate appellate decision and order terminating visitation between grandparents and their grandchild upon the child's adoption by her stepfather. *In the Matter of the Grandparental Visitation of CGF*, 168 Wis. 2d 62; 483 N.W.2d 803 (1992). In doing so, the court explained: "Once the grandparents in this case were ordered visitation rights with their minor grandchild, they should not have been deprived of those rights without due process." 483 N.W.2d at 806-807.

In a case in which the maternal aunt and uncle adopted a child whose mother had died, the maternal grandparents had visitation rights under a New Jersey order but were not notified of the adoption until after it had been finalized. *In re Adoption of a Minor Child,* 593 So. 2d 185, 186-187 (Fla. 1982). The court first determined that notice to the grandparents was not required by Florida's adoption statute; however, the court held, *id.*at 189:

> [T]he determination that notice was not *statutorily* required is not dispositive of the issue. Notice to legally interested parties so that they can assert their claims is the essence of the procedural due process protection provided by the Florida Constitution. Art. I, § 9, Fla. Const. As the United States Supreme Court has said:
>
> > An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.
>
> *Mullane v. Central Hanover Bank & Trust Co.,* 339 U. S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950).

There is no question in this case that the grandpar-

> ents were legally interested parties. Under the New Jersey court order the grandparents were given visitation rights, and, therefore, if for no other reason, acquired a legal interest in maintaining a relationship with Baby R.R. That legal interest clearly entitled the grandparents to notice of the prospective adoption and standing to intervene in the proceedings. (Citation omitted).

Thus, the Florida Supreme Court held that providing notice and standing to the maternal grandparents with court-ordered visitation rights is constitutionally required.

In *Quarles v French,* 611 S.W.2d 757 (Ark., 1981), the Supreme Court of Arkansas held that the refusal to grant standing to grandparents who have court-ordered visitation rights would be a "situation in which the rights granted by one court are extinguished by another court without affording the parties holding those rights an opportunity to be heard." 611 S.W.2d at 759. This result, however, violated the due process rights of the grandparents, which, "at the very minimum, requires a reasonable opportunity to be heard." *Id.* Thus, the grandparents were allowed to intervene, with the court succinctly stating that "grandparents who have been granted visitation . . . have a sufficient interest in the proceedings to entitle them to intervene for the limited purpose of offering such evidence as may be relevant to the focal issue, i.e., whether the proposed adoption is in the best interest of the children." *Id.*

That same year, in *Cox v. Stayton*, 619 S.W.2d 617 (Ark., 1981), the same court denied a due process challenge brought by a natural grandparents precisely because they were allowed to intervene in the proceedings: "In the present case, the appellants have been allowed to intervene in the adoption proceeding to present whatever evidence may have been relevant to the best interest of these children. Having had that opportunity, their rights have been preserved to them." 619 S.W.2d at 621.

One year later, in *Brown v. Meekins*, 643 S.W.2d 553 (Ark, 1982), the Court, relying on *Quarles*, *supra*, held that grandparents who have court-ordered visitation rights are not only entitled to intervene, they are "constitutionally entitled to receive notice of an adoption proceeding." 643 S.W.2d at 554. In *Brown*, as in the instant case, the grandparents would not have learned of the adoption but for a fortuitous circumstance: their attorney was in the courtroom on the day of the hearing. Failure to give notice, then, violated the grandparents' rights to due process, and the lower court's decision was reversed.

C. The Decisions of the Michigan Court of Appeals and the Mecosta County Probate Court Are Erroneous.

In this case, denial of standing to Petitioner Barbara Toth denied her a reasonable opportunity to be heard in the adoption of her grandson and the termination of her visitation rights. Her interest in the matter is sufficiently significant to warrant the protection of due process; moreover, the Michigan Adoption Code provides standing to other interested parties "in the interest of justice". Mich. Comp. Laws Ann. § 710.24a(6).

Under the test stated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), Petitioner's interest in her relationship with her grandson must be balanced against (1) the risk of erroneous deprivation and the value of additional safeguards and (2) the government's interest, including any additional fiscal and administrative burdens. In this case, the balance favors granting standing to Petitioner to intervene in the adoption of her grandson.

Although it is not the only factor, the extent of procedural due process to be afforded is influenced by the gravity of the loss to be suffered. *Santosky v Kramer*, 455 U.S. 745, 758 (1982). Petitioner's interest in her relationship with her grandson is a significant one, rendered even more significant

by the fact of the regular visitation over the course of several years; the termination of that relationship, much like the termination parental rights, is virtually irreversible.

In a case such as this one, where there is obvious hostility between opposing grandparents, the risk of erroneous deprivation is high indeed. It cannot be denied that a primary motivating factor in the adoption of Petitioner's grandson was their desire of Frank and Wanda Toth to circumvent the Montcalm County decision granting Petitioner visitation. Where only one side is allowed to present evidence, or only one side's evidence is considered by the court, there is an undeniably high risk of an erroneous deprivation of the rights of those on the other side.

The value of the additional safeguard in this case is obvious: allowing Petitioner to participate fully and to present evidence in the adoption of her grandson, a proceeding which will, if successful, terminate Petitioner's court-ordered visitation, can only lead to a more complete evaluation of the best interests of the child, a primary concern under both visitation law and adoption law. *See, e.g.*, Mich. Comp. Laws Ann. § 722.27b(3)("At the conclusion of the hearing, if the court finds that it is in the best interests of the child to enter a grandparenting time order, the court shall enter an order providing for reasonable grandparenting time . . . ."), Mich. Comp. Laws Ann. § 710.46(1)(b)(requiring an investigation into "the best interests of the adoptee").

There are, obviously, other interests involved as well. The child has an interest in seeing that his best interests are served; but, once again, granting standing to his grandmother, with whom he has also established a significant and loving relationship, can only advance those interests by providing the court the additional needed to make an accurate determination.

If Petitioner has a liberty interest in the relationship with her grandson, Frank and Wanda Toth have a similar interest. However, this interest is obviously subordinate to the child's

best interests, and will not be infringed by granting standing to Petitioner, who is not seeking to terminate their relationship with him. They will still be the child's custodial grandparents. Granting standing to Petitioner will, again, only serve to insure that the decision is truly in the best interests of the child.

The government also has an interest in seeing that the best interest of the child are served, and once again, this interest will only be furthered by allowing Petitioner to intervene. The fiscal implications of allowing standing to grandparents would be minor, at worst; the costs would be no greater than the state already faces when a grandparent petitions for grandparenting time, except in the most unusual of cases.

The Court of Appeals did not address the due process issue, focusing instead on statutory interpretation. However, the court's interpretation of the statute is clearly erroneous.

The Court of Appeals panel noted the existence of subsection 24a(6). (App. A, *infra*, p. 6A). However, the panel failed to address its import: that there are situations in which justice requires the inclusion of interested parties in addition to those specifically listed in the statute. Instead, the panel simply viewed the statute to be so clear as to render judicial construction unnecessary. Citing *In re Schnell*, 214 Mich. App 304, 543 N.W.2d 11 (1995), the panel stated (*id.*)(citation omitted):

> Here, the statute is clear so judicial construction is unnecessary. A grandmother, even one with visitation rights, is not enumerated as an interested party in the statute. Accordingly, the probate court correctly determined that Barbara Toth lacked standing to object to the adoption.

However, in this case the panel neglected to cite further in *Schnell*: "The provisions of the Adoption Code must be construed together as a whole." 214 Mich App at 312. Rather than properly construe the adoption code as a whole,

the panel simply ignored subsection 24a(6), so much so that the decision violates another rule of statutory construction: a court must "make every effort to give meaning to every part of it and avoid rendering any part nugatory." *State Bar v. Galloway*, 422 Mich. 188, 189, 369 N.W.2d 839 (1985). By neglecting subsection 24a(6), the Court of Appeals decision in this case renders it nugatory, since, according to the panel, if a party is not listed in subsection 24a(1), there is no standing, without regard to the "interest of justice".

The Court of Appeals failed to explicitly address the Petitioner's due process argument in its opinion; however, the panel gave a hint of the treatment the issue would likely have received when it noted that it was not persuaded by Petitioner's due process argument: "Our only concern is with the best interests of the minor child who is the subject of this litigation." (App. A, *infra*, p. 4A). There is no apparent concern for Petitioner's right to due process in the termination of her relationship with her grandson.

II. The question presented is an important one.

The importance of the rights of grandparents to maintain their relationships with their grandchildren is reflected in the fact that all fifty states have enacted grandparent visitation statutes. *See* Christine Davik-Galbraith, Note, *"Grandma, Grandpa, Where Are You?"—Putting the Focus of Grandparent Visitation Statutes on the Best Interests of the Child*, 3 Elder Law J. 143, 144 (1995). However, the effect of these statutes varies widely from state to state. *Id.* at 145-146.

The rights of grandparents to continued relationships with their grandchildren is on the verge of gaining federal recognition through an act of Congress. Current legislation would amend 28 U.S.C. § 1738A(b)(2)(requiring that full faith and credit be given to child custody determinations) to include grandparents with the right to custody or visitation within the definition of "contestant". H.R. 1690, 105th Cong., § 1(a).

In addition, the bill would amend § 1738(e), requiring "reasonable notice and opportunity to be heard", to include "custody or visitation determination." H.R. 1690, 105th Cong., § 1(g). Thus, if this legislation becomes law, a custody or visitation will be consistent with the federal law only if it provides for "reasonable notice and opportunity to be heard" to contestants, including grandparents, in custody and visitation determinations. This reasonable opportunity to be heard is, of course, what was denied to Petitioner in the instant case.

Michigan's current adoption code allows for continued grandparent visitation only where the child has been adopted by a stepparent, excluding the child's former grandparents from continued contact in all other cases. Mich. Comp. Laws Ann. 722.27b(2)(excluding visitation with "any child who has been placed for adoption with other than a stepparent, or whose adoption by other than a stepparent has been legally finalized.") However, in a case such as this, where a child is adopted by two other grandparents, one maternal and one paternal, there is no rational reason to exclude the other grandparent, the recipient of court-ordered visitation rights, from meaningful participation in the adoption.

Current legislation pending in the Michigan legislature recognizes this problem, and would amend the Michigan adoption code to allow grandparents to seek visitation with a grandchild who is in the custody of a party other than a parent, this right to seek visitation would not be defeated after adoption by a relative within the fifth degree. See H.B. 4275 (Mich.), H.B. 4276 (Mich). These bills have not, to date, been passed, and their retroactive application to Petitioner's plight is problematic, at best.

To date, this Court has not addressed the issue of the rights of grandparents in such cases. However, this issue is an important one which cries out for a definitive statement from this Court on at least one aspect: does a grandparent with court-ordered visitation have a right to continuing

visitation which cannot be terminated without due process?

This case presents the Court with the opportunity to address the issue of the rights of grandparents, to provide some uniformity on this issue, without requiring undue interference with state law. Michigan's adoption code allows for standing "in the interest justice"; a decision that Petitioner has the due process right to standing in this case would do no damage to that statute.

Conclusion

Due process requires that Petitioner's relationship with her grandson not be terminated without affording her, at a minimum, the right to be heard in a meaningful manner, to present her evidence, and to have that evidence considered by the courts. Instead, the procedures applied in this case allowed the opposing grandparents to defeat or circumvent those rights, and to destroy Petitioner's relationship with her grandson, simply because they did not believe Petitioner should be allowed such visitation. A grant of standing to Petitioner would not only preserve her due process rights, it would be of undeniable value to a court required to determine whether an adoption is in the best interest of the child.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

BARBARA TOTH, *PETITIONER*
V.
FRANK TOTH, WANDA TAYLOR TOTH, DAVID TOTH, SR., BRANDI SANSON, AND JOANNE VALLARELLI, GUARDIAN AD LITEM,
RESPONDENTS

On Petition for Writ of Certiorari to the Michigan Court of Appeals

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APPENDIX

STATE OF MICHIGAN

COURT OF APPEALS

In re TOTH

Docket Nos. 189176, 189203, 189810. Submitted April 10, 1997, at Lansing. Decided January 27, 1998, at 9:05 A.M.

Joanne Vallarelli, Guardian Ad Litem for David M. Toth, Jr.

Gerald V. Malling, for Frank and Wanda Toth.

Michael A. Mixer, Ann Arbor, for Barbara Toth.

Before: M. J. KELLY, P.J., and WAHLS and GAGE, JJ.

PER CURIAM. The two appellants, Barbara Toth and the guardian ad litem to the minor child, appeal as of right from the probate court order confirming the adoption of the child by appellees Frank and Wanda Toth. In addition, appellants appeal as of right from the circuit court orders that (1) denied their respective motions to stay the adoption proceedings and assume full jurisdiction of the case, (2) dismissed the guardian ad litem, and (3) terminated the prior visitation order.

This case involves what appears to be an issue of first impression in Michigan: the right of a grandparent with court-ordered visitation to intervene in adoption proceedings pursuant to MCL 710.24a(1); MSA 27.3178(555.24a)(1). We find that the appellant grandmother, Barbara Toth, did not have standing to intervene, and we therefore affirm the orders of the probate and circuit courts in that respect.

The facts of this case are unusual. Barbara Toth and Frank Toth, divorced in 1988, are the parents of David Toth, Sr. Frank Toth is currently married to Wanda Toth, who is the mother of Brandi Sanson. David Toth, Sr., and Brandi Sanson are the biological parents of David Michael Toth, Jr.,

the minor child at issue in the proceedings herein. Frank and Wanda Toth are therefore both the adoptive parents and the child's paternal grandfather and maternal grandmother respectively. Following his birth on September 5, 1990, the child lived with Barbara Toth, his paternal grandmother, for approximately ten weeks. From that time forward, the child has lived with Frank and Wanda Toth.

The first case involving the child was filed in the Montcalm Circuit Court in October 1990, when David Toth, Sr., petitioned for physical custody of the child. Barbara Toth intervened in that action, seeking grandparent visitation and consideration for possible placement if the parents of the minor child were deemed unfit. Frank and Wanda Toth later intervened with their own request for custody of the child. Following a trial, the circuit court granted custody to Frank and Wanda Toth and reserved the right to limit or extend Barbara Toth's visitation. Relying on *In re Clausen*, 442 Mich 648, 656; 502 NW2d 649 (1993), and *Bowie v Arder*, 441 Mich 23, 43; 490 NW2d 568 (1992), this Court upheld the circuit court's decision, finding that Barbara Toth had no standing to challenge the custody order. *Toth v Toth*, unpublished opinion per curiam of the Court of Appeals, issued December 8, 1993 (Docket No. 158467).

In April 1993, David Toth, Sr., and Brandi Sanson filed a consent in the Mecosta County Probate Court to Frank and Wanda Toth adopting the child pursuant to MCL 710.43; MSA 27.3178(555.43) and MCL 710.44; MSA 27.3178(555.44). Following the consent, the probate court terminated their parental rights. Frank and Wanda Toth then filed an adoption petition in the probate court. Barbara Toth filed a competing petition, along with a motion to stay the probate court proceedings. During the probate court proceedings, the circuit court had continued to issue visitation orders concerning the child. Moreover, after all parties agreed that it would be in the child's best interests, the circuit court appointed a guardian ad litem who had been selected and

whose fees continued to be paid by Barbara Toth. In July 1995, the probate court granted Frank and Wanda Toth's adoption petition. The circuit court subsequently terminated Barbara Toth's visitation rights and the guardian ad litem's appointment.

I

Barbara Toth and the guardian ad litem first argue that the circuit court erred in declining to stay the adoption proceedings in the probate court and assume full jurisdiction of the case. We disagree. The probate court and the circuit court had concurrent jurisdiction over the minor child. MCR 3.205(A); MCL 722.27(1)(c); MSA 25.312(7)(1)(c), MCL 710.24; MSA 27.3178(555.24). See also *In re DaBaja*, 191 Mich App 281, 288-289; 477 NW2d 148 (1991). The probate court was not required to obtain a waiver of jurisdiction by the circuit court before exercising its own jurisdiction. MCR 3.205; *Krajewski v Krajewski*, 420 Mich 729, 733-734; 362 NW2d 230 (1984); *DaBaja*, *supra*. There is no statute that requires the circuit court to assume full jurisdiction in such circumstances. The circuit court therefore did not err in declining to do so. Moreover, it is apparent from a reading of the circuit court opinions that the two judges had discussed the case, and the circuit court was comfortable with the confirmation decision.[1]

II

Barbara Toth and the guardian ad litem next argue that the circuit court erred in terminating Barbara Toth's visitation

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[1] We further note that the Legislature has addressed and resolved this issue for future cases by the creation of the family division of the circuit court, effective January 1, 1998, which will have sole and exclusive jurisdiction over adoption and child custody matters. M.C.L. § 600.1021; M.S.A. § 27A.1021.

with the minor child following the probate court's confirmation of the adoption.[2]

The effect of MCL 710.60(1); MSA 27.3178(555.60)(1) is to make the adopted child, as much as possible, a natural child of the adopting parents, and to make the adopting parents, as much as possible, the natural parents of the child. *Bikos v Nobliski*, 88 Mich App 157, 162; 276 NW2d 541 (1979). The Michigan adoption scheme expresses a policy of severing, at law, the prior, natural family relationship and creating a new and complete substitute relationship after adoption. *Id.* at 162-163; 276 NW2d 541; *In re Adams*, 189 Mich App 540, 544-545; 473 NW2d 712 (1991). Once a child has a new, complete family as evidenced by adoption, the grandparent visitation statute, MCL 722.27b; MSA 25.312(7b), ceases to apply. *Bikos*, *supra*.

Ordinarily, the circuit court's termination of the visitation order would, without question, be proper. In this very unusual instance, however, there seems to be ongoing relationships with all of the child's biological family, except with the paternal grandmother, Barbara Toth. While we sympathize with her desire for continued visitation with the minor child, the language of MCL 722.27b(1); MSA 25.312(7b)(1)--which states that a grandparent can seek visitation only if a child custody dispute is pending or if the grandparent's child is deceased--seems to preclude the option of continued visitation. The circuit court therefore did not err in terminating Barbara Toth's visitation. Furthermore, because a child custody dispute was not pending before the probate court, see MCL 722.27b(2); MSA 25.312(7b)(2);

---

[2] We note for purposes of this determination that we are not persuaded by Barbara Toth's equal protection arguments. Our only concern is with the best interests of the minor child who is the subject of this litigation.

Frame v Nehls, 452 Mich. 171, 178- 179, 180-181; 550 N.W.2d 739 (1996), the probate court could not have granted Barbara Toth grandparent visitation with the minor child either.

III

In what appears to be an issue of first impression, Barbara Toth also claims that the probate court erred in determining that even though she was a grandparent with court-ordered visitation rights, she did not have standing to intervene in the adoption proceedings. We disagree with her position.

In Michigan, adoption proceedings are governed entirely by statute. *Roberts v Sutton*, 317 Mich 458, 467-468; 27 NW2d 54 (1947). Section 24a(1) of the Adoption Code, MCL 710.24a(1); MSA 27.3178(555.24a)(1), specifically enumerates who is considered an interested party in adoption proceedings.

> (1) Interested parties in a petition for adoption are all of the following:
>
> (a) The petitioner.
>
> (b) The adoptee, if over 14 years of age.
>
> (c) A minor parent, adult parent, or surviving parent of an adoptee, unless 1 or more of the following apply:
>
> (i) The rights of the parent have been terminated by a court of competent jurisdiction.
>
> (ii) A guardian of the adoptee, with specific authority to consent to adoption, has been appointed.
>
> (iii) A guardian of the parent, with specific authority to consent to adoption, has been appointed.
>
> (iv) The rights of the parent have been released.
>
> (v) The parent has consented to the granting of the petition.
>
> (d) The department or a child placing agency to which the adoptee has been, or for purposes of

subsection (3) is proposed to be, released or committed by an order of the juvenile division of the probate court.

(e) A parent, guardian, or guardian ad litem of an unemancipated minor parent of the adoptee.

(f) The juvenile division of the probate court with permanent custody of the adoptee.

(g) A court with continuing jurisdiction over the adoptee.

(h) A child placing agency of another state or country that has authority to consent to adoption.

(i) The guardian or guardian ad litem of an interested party.

Section 24a(6) of the Adoption Code also provides, "In the interest of justice, the court may require additional parties to be served." MCL 710.24a(6); MSA 27.3178(555.24a)(6).

In interpreting a statute, courts may not speculate about the probable intent of the Legislature beyond the words expressed in the statute. *In re Schnell*, 214 Mich App 304, 310; 543 NW2d 11 (1995). Here, the statute is clear so judicial construction is unnecessary. *Id.* A grandmother, even one with visitation rights, is not enumerated as an interested party in the statute. Accordingly, the probate court correctly determined that Barbara Toth lacked standing to object to the adoption.

Furthermore, although a guardian ad litem had been appointed for the minor child by the circuit court, the guardian ad litem was not granted any specific authority by the circuit court and certainly was not granted the specific authority to consent to an adoption of the child. Therefore, under the statute, the probate court did not err in its refusal to recognize the authority of the guardian ad litem during the adoption confirmation proceedings.

The probate court also properly refused to consider

Barbara Toth's adoption petition. The natural parents of the minor child filed a consent to Frank and Wanda Toth adopting the child in April 1993 pursuant to MCL 710.43; MSA 27.3178(555.43) and MCL 710.44; M.S.A. 27.3178(555.44). All investigations were then directed toward the appropriateness of this placement. Barbara Toth correctly notes that once the parents' rights were terminated, the child became a ward of the court. MCL 710.51(3); MSA 27.3178(555.51)(3). She also is correct in noting that if the court had found adoption by Frank and Wanda Toth was not in the child's best interests, it could have returned "the child to the parents or original custodian and restore their rights, or make a disposition appropriate for the welfare of the ward ... by an ex parte order entered in the court." MCL 710.62; MSA 27.3178(555.62). It does not follow, however, that simply because this event could have happened the court was required to accept her petition before making a determination regarding Frank and Wanda Toth's petition.

This Court reviews a probate court's decision to grant or deny a petition for adoption for an abuse of discretion. *In re Kyung Won Kim*, 72 Mich App 85, 88; 249 NW2d 305 (1976). Two investigative reports were prepared in this case, and each addressed the required best interests of the child analysis. MCL 710.22(f); MSA 27.3178(555.22)(f). In both, the investigator recommended, albeit with some reservations, that the adoption petition be approved. From the reports, the case file, and the circuit court's prior custody opinion, the probate court was very familiar with the history of this case and all parties. The probate court did not abuse its discretion in granting the adoption petition of Frank and Wanda Toth.

IV

Finally, the circuit court did not abuse its discretion by dismissing the guardian ad litem after the probate court confirmed the adoption of the minor child. The guardian ad

litem was selected by Barbara Toth, who paid all her fees. She was appointed by the circuit court after a hearing conducted by the circuit court referee during which the other parties somewhat reluctantly agreed that a neutral party acting in the child's best interests might expedite the resolution of these matters. Her authority was never specifically delineated. Once the adoption was final, any reason for the guardian ad litem's appointment was clearly concluded, and her dismissal was therefore appropriate.

Affirmed.

/s/ Michael J. Kelly
/s/ Myron H. Wahls
/s/ Hilda R. Gage

STATE OF MICHIGAN **FILE NO. 93-801-AD**
PROBATE COURT
COUNTY OF MECOSTA

ORDER OF ADOPTION

In the matter of MICHAEL GRADY TOTH DOB:9-5-90, adoptee

THE COURT FINDS that:

1. A petition for an order of adoption was filed.

2. All necessary orders terminating parental rights have been entered.

3. The adoptee [ ] was made a ward of this court.
[x] was not

4. The adoption of the adoptee by the petitioner(s) is desirable and in the best interest of the adoptee.

IT IS ORDERED that:

5. From and after this date the parent(s) of the adoptee is/are:

WANDA TAYLOR TOTH and FRANK STEVEN TOTH, JR.

6. The name of the adoptee is MICHAEL GRADY TOTH

7. The adoptee, if a ward of this court, is discharged.

July 20, 1995 /S/ P-25275
Judge of Probate LaVail Hull

STATE OF MICHIGAN
IN THE PROBATE COURT FOR THE
COUNTY OF MECOSTA

In the matter of:

DAVID MICHAEL TOTH, JR., Minor File No. 93-801-AD
_____ /

ORDER

At a session of said Court held in the Mecosta County Courthouse, Big Rapids, Michigan, this 12th day of September, 1995

PRESENT HONORABLE LAVAIL HULL, PROBATE JUDGE

Barbara Toth having filed a Petition for Rehearing in the above matter and argument having been heard in open court, and the Court having found that such a rehearing is not in the best interest of the minor child, and Petitioner having failed to state a valid reason to set aside the adoption, and that Petition lacked standing,

IT IS ORDERED that the Petition for Rehearing and to stay the adoption pending Rehearing be and is hereby DENIED.

September 12, 1995 /s/
HONORABLE LA VAIL HULL,
Probate Judge
18th Probate Court District

ORDER

Entered: April 27, 1998

Michigan Supreme Court
Lansing, Michigan

Conrad L. Mallett, Jr.
Chief Justice

111521 & (75)
111523

James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Justices

In the matter of DAVID MICHAEL TOTH, JR., a Minor

BARBARA TOTH,
Appellant

SC: 111521
111523
COA: 189176
189203
189810
LC: 90-00676-DC
93-00801-AD

The motion for immediate consideration is GRANTED. On order of this Court, the applications for leave to appeal are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

i 0421

SEAL OF THE MICHIGAN SUPREME COURT

LANSING

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 27, 1998 /S/ Corbin R. Davis
Clerk

ORDER
Entered: June 29, 1998

Michigan Supreme Court
Lansing, Michigan

Conrad L. Mallett, Jr.
Chief Justice

111521 (78)
111523 (57)

In the matter of DAVID MICHAEL TOTH, JR., a Minor

James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Justices

FRANK STEVEN TOTH, JR, and WANDA TAYLOR TOTH,

Appellees

v SC: 111521
COA: 189203
LC: 93-801-AD

SC: 111521
111523
COA: 189176
189203
189810
LC: 90-0067-DC
93-00801-AD

BARBARA TOTH,

Appellant

In the matter of DAVID MICHAEL TOTH, JR., a Minor

BARBARA TOTH,

Appellant

v SC: 111523

COA: 189810
LC: 90-N-676 DC

FRANK STEVEN TOTH, JR. and
WANDA TAYLOR TOTH,

Appellees

On order of the Court, the motions for reconsideration of this Court's order of April 27, 1998, are considered, and they are DENIED, because it does not appear that the order was entered erroneously.

j 0623

SEAL OF THE MICHIGAN SUPREME COURT

LANSING

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 29, 1998 /S/ Corbin R. Davis
Clerk

STATE OF MICHIGAN
COURT OF APPEALS

DAVID M. TOTH, SR.,
Plaintiff-Appellee

and

FRANK TOTH, JR. and
WANDA TOTH,
Intervening Plaintiffs-Appellees

v

December 15, 1993

BRANDI SANSON,
Defendant-Appellee

No. 158467
LC No. 90-000676

BARBARA TOTH,
Intervening Defendant-Appellant

Before: McDonald, P.J., and Murphy and Taylor, J.J.

PER CURIAM

Intervening defendant Barbara Toth appeals as of right the November 6, 1992, order granting custody of David Toth, Jr., to intervening plaintiffs Frank Toth Jr., and Wanda Toth. We affirm on the ground that intervening defendant, as a third party, does not have standing to challenge the custody order.

Barbara Toth is the paternal grandmother of David Toth, Jr., born September 5, 1990. Frank and Wanda Toth are married and are the child's paternal grandfather and maternal grandmother. The natural parents, David Toth, Sr., and

Brandi Sanson, are step-siblings and have never been married.

While a child custody dispute was pending between the natural parents, Barbara Toth moved for third-party custody and grandparent visitation under MCL 722.72; MSA 25.312(7) and MCL 722.27b; MSA 25.312(7b). Likewise, Frank and Wanda Toth requested custody in the event that the trial court found it necessary to remove the child from the custody of David Toth, Sr.

At the trial, evidence was presented regarding the parental fitness or unfitness of the natural parents as well as all three grandparents. The trial court considered the best interest of David, Jr., and ordered that the child remain in the home of Frank and Wanda, where he had been living since shortly after his birth.

On appeal, Barbara Toth argues the trial court's custody award was against the great weight of the evidence. The natural parents do not challenge the custody order.

The Child Custody Act provides that, if a child custody dispute has been submitted, the trial court may award custody of the child to "1 or more of the parties involved or to others." MCL 722.27(1)(2); MSA 25.312(7). Further, the Supreme Court has stated that, while custody may be awarded to grandparents or other third parties according to the best interests of the child in an appropriate case, typically involving divorce, such an award is based not on the third party's legal rights to custody of the child, but on the court's determination of the child's best interest. Bowie v Arder, 441 Mich 23, 49, n 22; 490 NW2d 568 (1992). Therefore, the trial court had authority to award custody of David, Jr., to his grandparents.

However, the Supreme Court recently addressed the issue of third-party standing in custody disputes and determined that third parties do not have standing to bring custody actions under the Child Custody Act unless they are guardians or limited guardians. In re Clausen, 442 Mich 648, 656; 502

NW2d 649 (1993); Bowie, supra, 43. A third party, who is not a guardian or limited guardian, does not have a legal right to custody of a child on the basis that the child either resides with or has resided with the third party. Bowie, supra. In addition, a third party does not have standing to respond to a custody decree dissolving their right to custody of a child even if the third party did not create the custody dispute. Clausen, supra, 681, 683.

We affirm the custody order because intervening defendant is a third party with no standing to challenge the order.

/s/ Gary R. McDonald
/s/ William B. Murphy
/s/ Clifford W. Taylor

STATE OF MICHIGAN
IN THE PROBATE COURT FOR THE
COUNTY OF MECOSTA

IN THE MATTER OF THE ADOPTION OF DAVID MICHAEL TOTH, JR.	File No. 801 EMERGENCY MOTION TO STAY ADOPTION FOR LACK OF JURISDICTION

Attorney for Petitioner
Mark D. Osterman (P43447)
168 E. Center St.
Ithaca, MI 48847
(517) 875-4711

Now comes Barbara Toth, and brings this Petition saying:

1. Petitioner has jurisdiction to make said Petition on the basis that she has been granted visitation of this child by way of Order of the Circuit Court for the County of Montcalm.

2. The original Petition for adoption was not served on the 8th Judicial Circuit as required by law pursuant to MCL 710.24a; MSA 27.3178(555.24a) subsection (1)(g).

3. This child is under the jurisdiction of the Circuit Court pursuant to its authority under the Child Custody Act. See also *Smith vs Smith*, 131 Mich. App. 524; 346 NW2d 588 (1984).

4. Pursuant to legislative development of grandparent visitation rights the Petitioner is and has rights with respect to the well being of the child.

5. This Petitioner has contended for a substantial period of this child's life that the child has not received adequate care and may, as indicated by psychological evaluations

performed, be in a risk situation with persons seeking adoption. *Bikos vs Nobliski*, 88 MA 157; 276 NW 2d 541 (1979).

6. The Circuit Court made findings regarding its placement of the child but failed to articulate any criteria to determine whether the child was abused or neglected. *Searcy vs Searcy*, 173 MA 738; 433 NW 2d 398 (1988).

7. Petitioner shows that this Court has no jurisdiction in this matter where the child is subject to the continuing jurisdiction of the Circuit Court, *D'Allesandro vs Ely*, 173 MA 738; 434 NW 2d 662 (1988), without notification to said Court.

8. Petitioner shows that because of rights given to her pursuant to court ordered visitation in the matter pending in Montcalm County Circuit Court that she is an interested party as a matter of law.

9. As a party interested in the proceedings of the Montcalm County Circuit Court action, Petitioner would have received notice where such notice had been properly served.

10. Petitioner was only made aware of these matters as a result of correspondence between her appellate counsel and the counsel for Wanda and Frank Toth, dated February 13, 1994.

WHEREFORE, Petitioner asks this Court to Stay further proceedings until such time as Petitioner has opportunity to be heard and full notice given.

Respectfully submitted,
/s/
Mark D. Osterman
Attorney at Law

Date: 2/17/94

/s/
Barbara Toth

STATE OF MICHIGAN
IN THE PROBATE COURT FOR THE
COUNTY OF MECOSTA

IN THE MATTER OF THE ADOPTION OF DAVID MICHAEL TOTH, JR.	File No. 801 MOTION TO INTERVENE AND NOTICE OF COMPETING PETITION FOR ADOPTION

Attorney for Petitioner
Mark D Osterman (P43447)
168 E. Center St.
Ithaca, MI 48847
(517) 875-4711

Now comes Barbara Toth and in this Notice to Intervene shows the Court:

1. Petitioner's interest in these matters has been established by specific authority granting visitation over parental interests as set forth by Circuit Court decree and its subsequent modifications.

2. Petitioner failed to receive notice nor was she permitted to be heard at any hearing with regard to Petitioners by failure of notice.

3. Where the Circuit Court for Montcalm County has granted certain rights and not relinquished its jurisdiction, Petitioners right to be heard in this matter is established.

4. Petitioner has filed and hereby provides notice that she also seeks adoption for this child.

WHEREFORE, based upon the establishment of rights and jurisdiction of the Montcalm Circuit Court, the compet-

ing petition for adoption and the rights vested in Petitioner, Petitioner asks this Court to allow Petitioner to intervene for determination of placement of the child in adoption proceedings under way and to allow Petitioner to be heard.

Respectfully submitted,
/s/
Mark D. Osterman
Attorney at Law

Date: 2/17/94

/s/
Barbara Toth

STATE OF MICHIGAN
IN THE PROBATE COURT FOR THE
COUNTY OF MECOSTA

IN THE MATTER OF THE ADOPTION OF DAVID MICHAEL TOTH, JR.

File No. 801

ORDER TO STAY ADOPTION

Attorney for Petitioner
Mark D Osterman (P43447)
168 E. Center St.
Ithaca, MI 48847
(517) 875-4711

FILED
FEB 17 1994
LAVAIL HULL
JUDGE OF PROBATE
MECOSTA COUNTY,
MICHIGAN

In the Session of the Court held in the County of Mecosta, State of Michigan on this 17 day of February, 1994

PRESENT: HONORABLE LAVAIL E. HULL,
Probate Judge

This Petition having been filed by Barbara Toth seeking to intervene as a party in this matter, and the Court knowing certain issues to be resolved, and being fully advised in the premises;

IT IS ORDERED that this matter and the final adoption by Frank Toth and Wanda Toth is HEREBY STAYED pending arguments by Petitioner, Barbara Toth, on issues set forth in her Petition and adoption.

/s/
Lavail E. Hull
Probate Judge, Mecosta County

Date: 2/17/94
Prepared by:
Mark D. Osterman (P43447)
168 E. Center St.
Ithaca, MI 48847
(517) 875-4711

STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF MECOSTA

IN THE MATTER OF THE ADOPTION OF DAVID MICHAEL TOTH, JR. File No. 801

_____ /

ORDER

The Court having reviewed the instant file and having determined that no action has been taken by intervening petitioner, Barbara Toth, since February of 1994.

IT IS ORDERED that the Order to Stay Adoption issued by this Court on February 17, 1994 is here vacated.

IT IS FURTHER ORDERED that the Petition for Adoption File dated March 1, 1993 be set for confirmation within thirty (30) days.

Date: 6/1/95

/S/
HONORABLE LAVAIL HULL
Probate Judge
18th Probate Court District
Mecosta County, Michigan

FILED
JUN 1 1995
LAVAIL HULL
JUDGE OF PROBATE
MECOSTA COUNTY, MICHIGAN

STATE OF MICHIGAN
IN THE PROBATE COURT FOR THE COUNTY OF MECOSTA

In the matter of:

DAVID MICHAEL TOTH, JR. File No. 93-801-AD
Honorable LaVail Hull

ORDER DENYING EXPARTE MOTION TO STAY

In the regular session of the Probate Court held on the 20th day of July, AD 1995, before the Honorable La Vail Hull, Probate Judge, in the City of Big Rapids, County of Mecosta, State of Michigan.

This matter having appeared before the Court on an Objection to Confirmation of Adoption filed on behalf of Petitioner Barbara Toth, and the Court having reviewed that objection and all documents related thereto and upon deliberation the Court having treated it as an Exparte Motion to Stay these proceedings and being fully advised in the premise;

IT IS ORDERED that Petitioner Barbara Toth's Motion is hereby DENIED for those reasons stated upon the record.

/S/
La Vail Hull
Probate Judge

FILED
Aug 17, 1995
LAVAIL HULL
JUDGE OF PROBATE
MECOSTA COUNTY,
MICHIGAN

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MONTCALM

In the matter of: Case no. 90 N 676 DC

DAVID MICHAEL TOTH, JR., minor

ORDER

At a session of said Court held in the Montcalm County Courthouse in Stanton, Michigan, on the 29th day of September, 1995.

PRESENT: Honorable James K. Nichols, Circuit Judge

This matter was heard on 9-29-95, and the Guardian Ad Litem, Joanne Vallarelli and Attorney Gerald having appeared, and the Court being fully advised in the premises:

NOW THEREFORE IT IS HEREBY ORDERED AND ADJUDGED:

1. The Guardian Ad Litem, Joanne Vallarelli, is dismissed.
2. The file in this case is closed, and the jurisdiction of this Court is terminated.
3. Prior visitation orders for Barbara Toth are terminated.

/S/
James K. Nichols
Circuit Judge

Drafted by:
Gerald V. Malling, Atty
Box 5
Greenville, MI 48838

STATE OF MICHIGAN CASE NO. 93-801-AD
COUNTY OF MECOSTA
PROBATE COURT-JUVENILE DIVISION

ORDER OF DISMISSAL

1. In the matter of DAVID MICHAEL TOTH, JR.
DOB: 09/05/90

Upon confirmation of the adoption of David Michael Toth, Jr. to Frank and Wanda Toth:

IT IS THE ORDER OF THE COURT that the Petition for adoption filed on February 17, 1994, by Barbara Toth, be and is hereby dismissed.

FILED
AUG 17 1995
LAVAIL HULL
JUDGE OF PROBATE
MECOSTA COUNTY, MICHIGAN

Dated: August 17, 1995 /S/ P25275
LaVail E. Hull, Probate Judge
18th Probate Court District
Mecosta County

Court of Appeals, State of Michigan
ORDER

Frank Toth, et al v Barbara Toth

Docket # 189203

L.C. # 93-801 AD

E. Thomas Fitzgerald
Presiding Judge
Gary R. McDonald
Peter D. O'Connell
Judges

The Court orders that the motion for immediate consideration is GRANTED.

The motion for stay is DENIED for failure to establish good cause for staying the adoption order during the pendency of the appeal.

It is found that appellant has established good cause for inspecting and copying, as necessary, the probate court's record in this cause in order to facilitate appellant's appeal. It is further ordered that appellant's attorney shall be premitted to inspect and copy from the probate copurt's adoption record in this cause for purposes of the instant appeal. The probate court is directed to make said record available to counsel for Appellant Barbara Toth for purposes of this appeal.

Judge O'Connell concurs in part, but would deny the request for permission to inspect and copy the probate court's adoption file.

A true copy entered and certified by Ella Williams, chief Clerk, on

SEAL
STATE OF
MICHIGAN
COURT OF
APPEALS

OCT 30 1995
Date

/s/Ella Williams
Chief Clerk

Excerpts from Petitioner's Brief on Appeal to the Michigan Court of Appeals

Pages 21-22, 25-26

At least one court has held that the refusal to allow intervention by grandparents who have court-ordered visitation rights deprives them of their rights to due process. In *Quarles v French*, 611 SW2d 757 (Ark, 1981), the court found that the refusal to grant standing to grandparents who have court-ordered visitation rights would be a "situation in which the rights granted by one court are extinguished by another court without affording the parties holding those rights an opportunity to be heard." 611 SW2d at 759. This result, however, violated the due process rights of the grandparents, which, "at the very minimum, requires a reasonable opportunity to be heard." *Id.* Thus, the grandparents were allowed to intervene, with the court succinctly stating that "grandparents who have been granted visitation . . . have a sufficient interest in the proceedings to entitle them to intervene for the limited purpose of offering such evidence as may be relevant to the focal issue, i.e., whether the proposed adoption is in the best interest of the children." *Id.*

This decision was followed one year later by *Brown v Meekins*, 643 SW2d 553 (Ark, 1982), where the Court, relying on *Quarles*, *supra*, held that grandparents who have court-ordered visitation rights are not only entitled to intervene, they are "constitutionally entitled to receive notice of an adoption proceeding." 643 SW2d at 554. In *Brown*, as in this case, the grandparents would not have learned of the adoption but for a fortuitous circumstance: their attorney was in the courtroom on the day of the hearing. Failure to give notice, then, violated the grandparents' rights to due process, and the lower court's decision was reversed.

* * *

In addition, the adoption of her grandson by the Appellees has the effect of terminating her relationship with the child, and ending her court-ordered right to visitation with him. As in *Quarles*, *supra*, due process requires that a court not deprive her of these rights without affording her, at a minimum, the right to be heard in a meaningful manner. *Cummings v Wayne County*, 210 Mich App 249; NW2d (1995); *Dobrzenski v Dobrzenski*, 208 Mich App 514; 528 NW2d 827 (1995).

Excerpts from Petitioner's Application for Leave to Appeal to the Michigan Supreme Court

Pages 30-32 (footnote omitted)

C. Denial of standing violates Appellant's right to due process.

In her brief to the Court of Appeals, Appellant raised the issue of the violation of her right to due process. (Brief on Appeal, p 26). The Court of Appeals panel did not address this issue; however, it is a significant issue that should be addressed by this Court. Moreover, courts in other states that have addressed this issue have found that denial of standing in similar circumstances violates a grandparents due process rights.

In *Quarles v French*, 611 SW2d 757 (Ark, 1981), the court found that the refusal to grant standing to grandparents who have court-ordered visitation rights would be a "situation in which the rights granted by one court are extinguished by another court without affording the parties holding those rights an opportunity to be heard." 611 SW2d at 759. This result, however, violated the due process rights of the grandparents, which, "at the very minimum, requires a reasonable opportunity to be heard." *Id.* Thus, the grandparents were allowed to intervene, with the court succinctly stating that "grandparents who have been granted visitation . . . have a sufficient interest in the proceedings to entitle them to intervene for the limited purpose of offering such evidence as may be relevant to the focal issue, i.e., whether the proposed adoption is in the best interest of the children." *Id.*

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intervene, they are "constitutionally entitled to receive notice of an adoption proceeding." 643 SW2d at 554. In *Brown*, as in this case, the grandparents would not have learned of the adoption but for a fortuitous circumstance: their attorney was in the courtroom on the day of the hearing. Failure to give notice, then, violated the grandparents' rights to due process, and the lower court's decision was reversed.

More recently, the Florida Supreme Court found that notice to grandparents with court-ordered visitation was required: "Notice to legally interested parties so that they can assert claims is the essence of the procedural due process protections provided by the Florida Constitution." *In re Adoption of a Minor Child*, 593 So 2d 185, 189 (Fla, 1991). Moreover, to that court it was not even a close question:

> There is no question in this case that the grandparents were legally interested parties. Under the New Jersey court order the grandparents were given visitation rights, and, therefore, if for no other reason, acquired a legal interest in maintaining a relationship with Baby R.R. That legal interest clearly entitled the grandparents to notice of the prospective adoption and standing to intervene in the proceedings. 593 So 2d at 189 (citations omitted).

As in *Quarles*, *supra*, and *Brown*, *supra*, in this case due process requires that a court not deprive Appellant of her court-ordered visitation with her grandson without affording her, at a minimum, the right to be heard in a meaningful manner, as stated by the Court of Appeals in *Dobrzenski v Dobrzenski*, 208 Mich App 514, 515; 528 NW2d 827 (1995):

> "'Due process applies to any adjudication of important rights.'" *In re Brock*, 442 Mich 101, 110; 499 NW2d 752 (1993), quoting *In re LaFlure*, 48 Mich App 377, 385; 210 NW2d 482 (1973). It is a flexible concept calling "'for such procedural protections as the particular situation demands.'" *Brock*, p 111, 499

> NW2d 752; quoting *Mathews v Eldridge*, 424 US 319, 334; 96 S Ct 893, 902; 47 L Ed 2d 18 (1976). Due process requires fundamental fairness, which involves consideration of the private interest at stake, the risk of an erroneous deprivation of such interest through the procedures used, the probable value of additional or substitute procedures, and the state or government interest, including the function involved and the fiscal or administrative burdens imposed by substitute procedures. *Brock*, 442 Mich p 111; 499 NW2d 752; citing *Mathews*, 424 US p 335; 96 S Ct at 903.

In this case, the private interests at stake are sufficiently significant to warrant a grant of standing to Appellant; although this Court has held that "[g]randparent visitation is not encompassed within the definition of a 'fundamental right' explicated by the United States Supreme Court", *Frame v Nehls*, 452 Mich 171, 183-184; 550 NW2d 739 (1996), here, unlike *Frame*, the Appellant had already established a long-term relationship with her grandson, protected by the visitation orders of the Montcalm Circuit court. The procedures used in this case allowed the Appellees to defeat or circumvent those rights simply because they did not believe Appellant should be allowed such visitation, and without allowing Appellant standing in this case the court was shown only one side of the story. Granting Appellant standing has undeniable value to a court truly desiring to determine whether an adoption is in the best interest of the child. Indeed, it cannot be denied that the state has a significant interest in determining adoptions **only** after a full consideration of the best interest factors. See MCL 710.22(f); MSA 27.3178(555.22)(f).

Excerpts from Petitioner's Motion for Reconsideration in the Michigan Supreme Court

Motion for Reconsideration, pp. 1-2

3. Appellant Barbara Toth requests that this Court reconsider its April 27, 1998, order for the following reasons:

A. The published decision of the Court of Appeals is a clearly erroneous interpretation of § 24a of the Michigan Adoption Code, MCL 710.24a; MSA 27.3178(555.24a), and is now binding on all lower Michigan Courts pursuant to MCR 7.215(C)(2), as more fully explained in the accompanying Brief in Support of Motion for Reconsideration.

B. The decisions of the Court of Appeals and the Mecosta Probate Court contravene Appellant's right to due process as guaranteed by the federal and state constitutions, US Const, Am XIV; Const 1963, art 1, § 17, as more fully explained in the accompanying Brief in Support of Motion for Reconsideration.

4. Reversal of the decisions of the Court of Appeals, the Mecosta Probate Court, and the Montcalm Circuit Court regarding this adoption, Appellant's standing to intervene in the adoption, and Appellant's visitation with her grandson would have **no** negative consequences for the child; the only consequences would be **positive**: he could remain in the custody of Appellees while the court reconsiders whether the adoption is truly in his best interests and would enjoy visitation with his paternal grandmother, Appellant Barbara Toth, with whom he previously had a close and loving relationship.

Brief in Support of Motion for Reconsideration, pp. 6-10

II. Leave to appeal is warranted because the decisions of the Court of Appeals and the Mecosta Probate Court contravene Appellant's right to due process as guaranteed by the federal and state constitutions, US Const, Am XIV; Const 1963, art 1, § 17.

Appellant Barbara Toth enjoyed court-ordered visitation with her grandson; the denial of standing to her in his adoption operates to deprive her of this court-ordered right to visit with her grandson without affording her a reasonable opportunity to be heard, thus denying Appellant her due process rights guaranteed by the federal and state constitutions. US Const, Am XIV; Const 1963, art 1, § 17. This is an important constitutional question which the Court of Appeals did not address,[3] but one which this Court can and should address.

Courts in at least three states have held that where a grandparent is denied standing to intervene in the adoption of a grandchild, that grandparent's due process rights are violated, particularly where the grandparent enjoyed court-ordered visitation with the grandchild. In *In the Matter of the Grandparental Visitation of CGF*, 168 Wis 2d 62; 483 NW2d 803 (1992), the Supreme Court of Wisconsin reversed an intermediate appellate decision an order terminating visitation between grandparents and their grandchild upon the child's adoption by her stepfather. In doing so, the court explained: "Once the grandparents in this case were ordered

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[3]In a footnote, the Court of Appeals panel stated that it was "not persuaded by Barbara Toth's equal protection arguments. Our only concern is with the best interests of the child who is the subject of this litigation." *Toth*, slip op at 6, n 2. It did not, however, address the due process issues raised in the authority cited in the Appellant's briefs.

visitation rights with their minor grandchild, they should not have been deprived of those rights without due process." 483 NW2d at 806-807.

The Florida Supreme Court has held that providing notice to grandparents with court-ordered visitation and granting them standing to intervene is constitutionally required: "Notice to legally interested parties so that they can assert claims is the essence of the procedural due process protections provided by the Florida Constitution." *In re Adoption of a Minor Child*, 593 So 2d 185, 189 (Fla, 1991). Moreover, to that court it was not even a close question:

> There is no question in this case that the grandparents were legally interested parties. Under the New Jersey court order the grandparents were given visitation rights, and, therefore, if for no other reason, acquired a legal interest in maintaining a relationship with Baby R.R. That legal interest clearly entitled the grandparents to notice of the prospective adoption and standing to intervene in the proceedings. 593 So 2d at 189 (citations omitted).

In *Quarles v French*, 611 SW2d 757 (Ark, 1981), the Supreme Court of Arkansas held that the refusal to grant standing to grandparents who have court-ordered visitation rights would be a "situation in which the rights granted by one court are extinguished by another court without affording the parties holding those rights an opportunity to be heard." 611 SW2d at 759. This result, however, violated the due process rights of the grandparents, which, "at the very minimum, requires a reasonable opportunity to be heard." *Id.* Thus, the grandparents were allowed to intervene, with the court succinctly stating that "**grandparents who have been granted visitation . . . have a sufficient interest in the proceedings to entitle them to intervene for the limited purpose of offering such evidence as may be relevant to the focal issue, i.e., whether the proposed adoption is in**

the best interest of the children." *Id.*

That same year, in *Cox v Stayton*, 619 SW2d 617 (Ark, 1981), the same Court denied a due process challenge brought by a natural grandparents precisely because they were allowed to intervene in the proceedings: "In the present case, the appellants have been allowed to intervene in the adoption proceeding to present whatever evidence may have been relevant to the best interest of these children. Having had that opportunity, their rights have been preserved to them." 619 SW2d at 621. One year later, in *Brown v Meekins*, 643 SW2d 553 (Ark, 1982), the Court, relying on *Quarles*, *supra*, held that grandparents who have court-ordered visitation rights are not only entitled to intervene, they are "constitutionally entitled to receive notice of an adoption proceeding." 643 SW2d at 554. In *Brown*, as in this case, the grandparents would not have learned of the adoption but for a fortuitous circumstance: their attorney was in the courtroom on the day of the hearing. Failure to give notice, then, violated the grandparents' rights to due process, and the lower court's decision was reversed.

"Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker." *Cummings v Wayne County*, 210 Mich App 249, 253; 533 NW2d 13 (1995). As explained by the Court of Appeals in *Dobrzenski v Dobrzenski*, 208 Mich App 514, 515; 528 NW2d 827 (1995):

> "'Due process applies to any adjudication of important rights.' " *In re Brock*, 442 Mich 101, 110; 499 NW2d 752 (1993), quoting *In re LaFlure*, 48 Mich App 377, 385; 210 NW2d 482 (1973). It is a flexible concept calling " 'for such procedural protections as the particular situation demands.' " *Brock*, p 111, 499 NW2d 752; quoting *Mathews v Eldridge*, 424 US 319, 334; 96 S Ct 893, 902; 47 L Ed 2d 18 (1976). Due process requires fundamental

> fairness, which involves consideration of the private interest at stake, the risk of an erroneous deprivation of such interest through the procedures used, the probable value of additional or substitute procedures, and the state or government interest, including the function involved and the fiscal or administrative burdens imposed by substitute procedures. *Brock*, 442 Mich p 111; 499 NW2d 752; citing *Mathews*, 424 US p 335; 96 S Ct at 903.

In this case, the private interests at stake are sufficiently significant to warrant a grant of standing to Appellant. Although this Court has held that "[g]randparent visitation is not encompassed within the definition of a 'fundamental right' explicated by the United States Supreme Court", *Frame v Nehls*, 452 Mich 171, 183-184; 550 NW2d 739 (1996), here, unlike *Frame*, the Appellant had already established a long-term relationship with her grandson, protected by the visitation orders of the Montcalm Circuit court.

Although the Court of Appeals failed to address this important question, it supported its decision by stating that "it is apparent from a reading of the circuit court opinions that the two judges had discussed the case, and the circuit court was comfortable with the confirmation decision." *Toth*, slip op at 3. **However, a conversation between two judges does not constitute due process.** Appellant Barbara Toth was granted no opportunity to participate and be heard in the adoption of her grandson.

Thus, the lower courts and the Court of Appeals have allowed Appellees to circumvent the prior visitation orders of the Montcalm Circuit Court without affording Appellant any reasonable to be heard. Due process requires that Michigan courts not deprive Appellant of her court-ordered visitation with her grandson without affording her, at a minimum, the right to be heard in a meaningful manner, to present her evidence, and to have that evidence considered by the courts. Instead, the procedures applied in this case allowed the

Appellees to defeat or circumvent those rights, and to destroy Appellant's relationship with her grandson, simply because Appellees did not believe Appellant should be allowed such visitation. Granting Appellant standing has undeniable value to a court truly desiring to determine whether an adoption is in the best interest of the child. Indeed, it cannot be denied that the state has a significant interest in confirming adoptions only after a full consideration of the best interest factors. See MCL 710.22(f); MSA 27.3178(555.22)(f).